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7 CORNERSTONE BUILDING GROUP

8 **UNITED STATES DISTRICT COURT**

9 **FOR THE SOUTHERN DISTRICT OF CALIFORNIA,**

10 PALOMAR GRADING AND PAVING,
11 INC., a California Corporation; and
12 THE UNITED STATES OF AMERICA
For The Use And Benefit Of PALOMAR
13 GRADING AND PAVING, INC.;

14 Plaintiff,

15 vs.

16 WESTERN INSURANCE COMPANY
17 and CORNERSTONE BUILDING
GROUP

18 Defendant.

CASE NO. 08 CV 521 JAH.WMc

DEFENDANT CORNERSTONE BUILDING
GROUP'S MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT OF
PETITION TO COMPEL MEDIATION AND
STAY PROCEEDINGS

19
20 Defendant Cornerstone Building Group (hereinafter "CBG") submits the following
21 memorandum of points and authorities in support of its motion to compel mediation of
22 the claims alleged against them by plaintiffs, and to stay the proceedings of this court for
23 damages pending mediation.

24 **I. INTRODUCTION**

25 This case involves claims by subcontractor, plaintiff Palomar Grading and Paving,
26 Inc. (hereinafter "Palomar") against contractor CBG and the corporate surety of bonds,
27 defendant Western Insurance Company (hereinafter "Western"). On November 6, 2006,
28 subcontractor Palomar entered into a written agreement with contractor CBG to perform

CBG'S POINTS AND AUTHORITIES IN SUPPORT OF PETITION TO COMPEL MEDIATION AND STAY PROCEEDINGS



1 construction work at 3300 Smart Clinic on Naval Base San Diego, in San Diego
 2 California (hereinafter "Subcontract"). Palomar alleges that CBG breached the
 3 Subcontract between Palomar and CBG by unlawfully withholding payment for services
 4 provided by Palomar, CBG converted the sums due to Palomar, and Western denied
 5 Palomar's bond claim in bad faith and in violation of the Miller Act.

6 The Subcontract between CBG and Palomar contains broad mediation provisions
 7 mandating that all disputes between CBG and Palomar, whether based in contract or
 8 tort, must be mediated. CBG seeks to exercise its contractual right to mediation of the
 9 claims asserted against it by Palomar, and therefore seeks to compel mediation of those
 10 claims.

11 Furthermore, CBG seeks a stay of this action until the completion of the
 12 mediation, and, at minimum, assert their right to a stay of all proceedings until this
 13 motion is heard and decided, pursuant to the Federal Arbitration Act of 1998, 9 U.S.C.
 14 §§ 3-4 (1998).

15 **II. THE SUBCONTRACT'S MEDIATION CLAUSE FALLS WITHIN THE PURVIEW**
 16 **OF THE FEDERAL ARBITRATION ACT, WHICH MANDATES DISTRICT COURTS TO**
 17 **DIRECT THE PARTIES TO PROCEED TO MEDIATION.**

18 The Federal Arbitration Act of 1998, 9 U.S.C. §§ 1-15 (1988) (hereinafter "The
 19 Act") governs this Court's analysis in granting an order compelling mediation. The Act
 20 defines arbitration as a process that will "settle" the controversy. 9 U.S.C. § 2. Because
 21 the mediation clause in the Subcontract manifests CBG and PALOMAR's intent to
 22 provide an alternative method to "settle" controversies arising under their subcontract,
 23 the mediation clause fits within the Act's definition of arbitration. See, AMF, Inc. v.
 24 Brunswick Corp., 621 F. Supp. 456 (E.D.N.Y. 1985.)

25 The language is clearly broad enough to suits brought under the Miller Act.
 26 Further, nothing in the language of the Miller Act itself precludes agreements to arbitrate.
 27 U.S. for Use and Benefit of Industrial Engineering & Metal Fabricators, Inc. v. Eric
 28 Elevator Corp., 214 F.Supp. 947, 948 (D.C. Mass. 1963.) In general, parties can agree



1 to submit to arbitration rights created by statute as well as those arising at common law
 2 unless the right is one of a character inappropriate for enforcement by arbitration. See,
 3 United States for Use and Benefit of Ray Gains, Inc. v. Essential Const. Co., 261
 4 F.Supp. 715 (D.C. Md. 1966.) Miller Act cases have been considered as typical of
 5 situations in which arbitration is both appropriate and useful and the courts uniformly
 6 appear to hold that the provisions of The Act are ordinarily applicable to Miller Act cases.
 7 See, Wilko v. Swan, 346 U.S. 427, 432, 435 (1953); United States for Use and Benefit of
 8 Air-Con, Inc. v. Alcon Development Corp., 271 F.2d 904 (4th Cir. 1959); United States
 9 for Use and Benefiit of Frank A. Trucco & Sons Co. v. Bregman Construction Corp., 256
 10 F.2d 851 (7th Cir. 1958).

11
 12 **III. THE MEDIATION CLAUSE IN THE SUB-CONTRACT IS INLCUSIVE OF**
PALOMAR'S CLAIMS AND IS THE EXCLUSIVE REMEDY FOR PALOMAR.

13 **A. The Sub-Contract Clearly Demonstrates the Parties' Intent to Mediate**
 14 **Disputes.**

15 On October 2, 2006, Palomar signed a Long Form Subcontract with CBG. That
 16 agreement contains a broad mediation provision, whereby Palomar and CBG agreed
 17 that all claims between them, whether sounding in contract or in tort, would be mediated.
 18 (See Affidavit of Joseph N. Casas in Support of Defendant Cornerstone Building Group's
 19 Petition to Compel Mediation and Stay Proceedings filed concurrently herewith ("Casas
 20 Dec."), ¶ 4, and Ex. "A" of Motion to Compel Mediation ("Motion to Compel")
 21 (Subcontract, dated October 6, 2006, pp. 17-18.) The mediation provision states in
 22 relevant part:

23 Claims not Involving Owner. To the extent Subcontractor submits a claim
 24 which Contractor determines is one for which Owner may not be liable, or
 25 is one which Contractor elects to not allow Subcontractor to further pursue
 26 with Owner, or to the extent Contractor has a claim against Subcontractor,
 the following procedures shall apply and begin within 60 days of
 notification:

27 (a). If the dispute cannot be settled thought direct discussions, the parties
 shall attempt to settle the dispute by mediation before recourse to any
 28 other method of dispute resolution. Unless the parties agree otherwise,



1 the mediation shall be conducted in accordance with the Construction
2 Mediation Rules of the American Arbitration Association.

3 (b). If mediation does not resolve the dispute, then the parties may agree
4 to resolve the dispute through binding arbitration. If so, the arbitrator(s)
5 decision shall be enforceable in a court of law and judgment shall be
6 entered in accordance with such decision.

7 (c). If mediation does not resolve the dispute and the parties do not agree
8 to resolution by binding arbitration, either party may proceed with any
9 allowable resolution process.

10 (See Exhibit "A" of Motion to Compel, pp. 17-18.)

11 This mediation provision expressly indicates Palomar and CBG agreed and
12 intended to mediate disputes related to the Subcontract. Despite the mediation
13 provision, counsel for Palomar filed a complaint in this court on March 20, 2008 after
14 informal attempts to resolve the dispute with CBG were unsuccessful. Because Palomar
15 failed to comply with the mandatory mediation provision, CBG was forced to file this
16 motion to compel mediation.

17 **B. The Mediation Clause Is Broad Enough To Cover This Dispute.**

18 The Supreme Court has held that "any doubts concerning the scope of arbitrable
19 issues should be resolved in favor of arbitration, whether the problem at hand is the
20 construction of the contract language itself or an allegation of waiver, delay, or like
21 defense to arbitrability." *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460
22 U.S. 1, 24-25 (1983); *see also*, *AT&T Techs., Inc. v. Communications Workers of*
23 *America*, 475 U.S. 643, 650 (1986) (where the presence of arbitration clause creates a
24 presumption of arbitrability.) A court should grant a request for an order to compel
25 arbitration "unless it may be said with positive assurance that the arbitration clause is not
26 susceptible of an interpretation that covers the asserted dispute." *AT&T Techs.*, 475
27 U.S. at 650 (citing *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-583
28 (1960)). Further, the presumption in favor of arbitration acquires particular significance
when the arbitration clause is broadly worded. *See*, *AT&T Technologies*, 475 U.S. at
650. Such circumstances call for arbitration of any grievance not expressly excluded by



1 the arbitration clause, unless there exists "the most forceful evidence of a purpose to
2 exclude the claim for arbitration." See, AT&T Technologies, 475 U.S. at 650 (quoting
3 United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 584-585
4 (1960).)

5 Here, paragraph 15.1 of the Subcontract states that "to the extent Subcontractor
6 submits a claim which Contractor determines is one for which Owner may not be liable,
7 or is one which Contractor elects to not allow Subcontractor to further pursue with
8 Owner, or to the extent Contractor has a claim against Subcontractor", the parties must
9 go to mediation for such claim before the parties engage in litigation. This provision is
10 broadly worded and covers all disputes relating to the Subcontract. Palomar's dispute is
11 a dispute related to the Subcontract because it relates to the performance of services
12 under the Subcontract. Because the dispute relates to the Subcontract the mandatory
13 mediation provision in Section 15.1 of the Subcontract applies and the parties should be
14 compelled to mediate the dispute.

15 Further, Palomar's claim is not excluded, as stated, the only claim that would be
16 excluded from the mediation clause would be one from the Subcontractor against the
17 Owner (Palomar against Navy), where Owner (Navy) is either liable or Contractor allows
18 Subcontractor to pursue Owner. However, none of the claims alleged by Palomar
19 (Subcontractor) are against the Owner (United States Navy). Thus, this broadly worded
20 mediation provision applies and creates a strong presumption in favor of mediation.

21 Even if Palomar's allegations only "touch matters" covered by the agreement,
22 then claims based on those allegations must go to mediation. Mitsubishi Motors Corp. v.
23 Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 625 (1985). Palomar's allegations against
24 CBG relate, broadly speaking, to the Subcontract (performance of construction services),
25 and therefore "touch matters" covered by the Subcontract. Specifically, Palomar alleges
26 that (1) CBG breached the contract by failing and refusing to pay Palomar for
27 performance of construction work; (2) CBG converted money due to Palomar for its
28 construction work performed; and (3) Western, in bad faith, has denied Palomar's claim



1 on the bond that guaranteed the payment for the construction work performed.
 2 Palomar's claims are clearly related to the Subcontract and are not made against the
 3 Owner (Navy), and are therefore covered by the mediation agreement.

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 5 **IV. THE DISTRICT COURT SHOULD COMPEL THE PARTIES TO MEDIATE AND**
 6 **STAY THE PROCEEDINGS IN THIS CASE BECAUSE ALL THE CLAIMS ARE**
 7 **SUBJECT TO MEDIATION**

8 Congressional policy, as embodied in the Federal Arbitration Act, favors
 9 enforcement of arbitration clauses in commercial contracts. *See, Mitsubishi Motors*
 10 *Corp.*, 473 U.S. at 625; *see also, Moses H. Cone Memorial Hosp.*, 460 U.S. at 24.
 11 Section 2 of The Act expresses this preference, stating that written agreements to
 12 arbitrate in such contracts "shall be valid, irrevocable, and enforceable, save upon such
 13 grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

14 Section 4 of the Federal Arbitration Act provides that, if the court is satisfied that
 15 the parties agreed to arbitrate the claims alleged, the court *shall* make an order directing
 16 the parties to proceed to arbitration in accordance with the terms of the agreement.

17 Section 4 states:

18 A party aggrieved by the alleged failure, neglect, or refusal of another to
 19 arbitrate under a written agreement for arbitration may petition any United
 20 States district court which, save for such agreement, would have
 21 jurisdiction under Title 28, in a civil action or in admiralty of the subject
 22 matter of a suit arising out of the controversy between the parties, for an
 23 order directing that such arbitration proceed in the manner provided for in
 24 such agreement. Five days' notice in writing of such application shall be
 25 served upon the party in default. Service thereof shall be made in the
 26 manner provided by the Federal Rules of Civil Procedure. The court shall
 27 hear the parties, and upon being satisfied that the making of the
 28 agreement for arbitration or the failure to comply therewith is not in issue,
 the court shall make an order directing the parties to proceed to arbitration
 in accordance with the terms of the agreement. The hearing and
 proceedings, under such agreement, shall be within the district in which
 the petition for an order directing such arbitration is filed. If the making of
 the arbitration agreement or the failure, neglect, or refusal to perform the
 same be in issue, the court shall proceed summarily to the trial thereof. If
 no jury trial be demanded by the party alleged to be in default, or if the
 matter in dispute is within admiralty jurisdiction, the court shall hear and
 determine such issue. Where such an issue is raised, the party alleged to
 be in default may, except in cases of admiralty, on or before the return day



1 of the notice of application, demand a jury trial of such issue, and upon
 2 such demand the court shall make an order referring the issue or issues to
 3 a jury in the manner provided by the Federal Rules of Civil Procedure, or
 4 may specially call a jury for that purpose. If the jury find that no agreement
 5 in writing for arbitration was made or that there is no default in proceeding
 6 thereunder, the proceeding shall be dismissed. If the jury find that an
 7 agreement for arbitration was made in writing and that there is a default in
 8 proceeding thereunder, the court shall make an order summarily directing
 9 the parties to proceed with the arbitration in accordance with the terms
 10 thereof. 9 U.S.C. § 4.

11 In light of the expressly stated mediation provision between CBG and Palomar,
 12 and CBG's request and petition to the Court for an order compelling mediation in
 13 accordance with the Subcontract, the Court must issue an order compelling mediation.

14 Section 3 of the Federal Arbitration Act further provides that, upon application of a
 15 party, any court of the United States *must* stay the proceedings of any actions arising
 16 from claims that are arbitrable and are referable to arbitration under an agreement in
 17 writing for such arbitration. These statutory provisions remain mandatory, as the
 18 Supreme Court emphasized in *Dean Witter Reynolds v. Byrd*, 470 U.S. 213, 218 (1985).
 19 Section 3 states:

20 If any suit or proceeding be brought in any of the courts of the United
 21 States upon any issue referable to arbitration under an agreement in
 22 writing for such arbitration, the court in which such suit is pending, upon
 23 being satisfied that the issue involved in such suit or proceeding is
 24 referable to arbitration under such an agreement, shall on application of
 25 one of the parties stay the trial of the action until such arbitration has been
 26 had in accordance with the terms of the agreement, providing the
 27 applicant for the stay is not in default in proceeding with such arbitration.
 28 9 U.S.C. § 3.

Palomar brought suit before a court of the United States for issues referable to
 arbitration under the Subcontract. Because Palomar's issues alleged in the suit are
 arbitrable CBG does hereby request and move for a stay of all district court proceedings
 concerning the claims alleged against it until after conclusion of the mediation requested
 by this motion is concluded.

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1 **V. CONCLUSION**

2 For the foregoing reasons, defendant CBG respectfully requests that the Court
3 grant its petition to compel mediation of the claims against it, and to stay the proceedings
4 in this court.

5 Dated: 4/29/08

Respectfully submitted,

CASAS LAW GROUP, P.C.

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10 By: Joseph N. Casas / Tamara M. Craft
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12 Cornerstone Building Group
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